

NOV 21 2014

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Eckert Seamans Cherin & Mellott, LLC
10 Bank Street
Suite 700
White Plains, NY 10606

TEL: 914 949 2989
FAX: 914 949 5424
FCC Mail Room

Geraldine Cheverko
914.949.3989
gcheverko@eckertseamans.com

November 13, 2014

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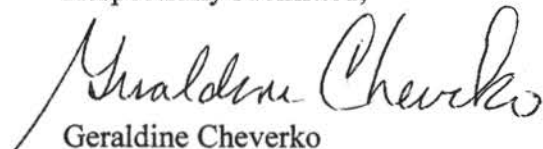
Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington DC 20554

Re: Petition of Amicus Mediation & Arbitration Group, Inc. and Hillary Earle
for Waiver of the "Opt Out" Requirement Pursuant to FCCF Order 14-164
CG Docket No. 02-278, 05-338

Dear Ms. Dortch,

On behalf of Amicus Mediation & Arbitration Group, Inc. and Hillary Earle, enclosed please find a copy of a Petition for Waiver of the requirements of 47 § 64.1200(a) with regard to faxes sent with the recipient's prior express consent, filed electronically today, November 13, 2014.

Respectfully submitted,


Geraldine Cheverko

Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of:)	CG Docket No. 02-278
)	
Petition of Amicus Mediation &)	CG Docket No. 05-338
Arbitration Group, Inc., and Hillary)	
Earle for Waiver of the "Opt Out")	
Requirement Pursuant to FCC Order)	
14-164)	

PETITION FOR WAIVER REGARDING 47 C.F.R. § 64.1200(a)(4)(iv)

Geraldine A. Cheverko
ECKERT SEAMANS CHERIN & MELLOTT, LLC
10 Bank Street, Suite 700
White Plains, NY 10606
914.949.2909 (telephone)
914.949.5424 (facsimile)
gcheverko@eckertseamans.com

Marshall D. Bilder
Jason S. Feinstein
ECKERT SEAMANS CHERIN & MELLOTT, LLC
50 West State Street, Suite 1400
P.O. Box 1298
Trenton, NJ 08607
609.989.5043 (telephone)
609.392.7956 (facsimile)
mbilder@eckertseamans.com
jfeinstein@eckertseamans.com

*Counsel for Amicus Mediation & Arbitration
Group, Inc., and Hillary Earle*

Dated: November 13, 2014

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EXECUTIVE SUMMARY

Amicus Mediation & Arbitration Group, Inc. ("Amicus") is a small family business that is currently the target of a putative class action lawsuit alleging violations of the Telephone Consumer Protection Act of 1991 ("TCPA") for the alleged transmission of "well over 5000" "unsolicited and/or solicited" facsimile advertisements that did not contain proper opt out notices.¹

While Plaintiff Roger H. Kaye and Roger H. Kaye, MD PC (collectively, "Kaye") interpreted 47 C.F.R. § 64.1200(a)(4)(iv) to mean that the opt-out notice requirements pertained equally to solicited and unsolicited faxes, Amicus reasonably believed that faxes sent with the prior express permission of the recipient were not required to comply with that provision.

Due to widespread confusion regarding this issue, the Federal Communications Commission ("Commission" or "FCC") recently considered the issue and ruled that "parties who have sent fax ads with the recipient's prior express permission may have reasonably been uncertain about whether [the Commission's] requirement for out-out notices applied to them." FCC 14-164, ¶ 1. Although ultimately deciding that the opt-out requirements pertain equally to solicited and unsolicited faxes, the Commission pointed out that an inconsistent footnote in a previous order, as well as notice procedures that did not make clear that the opt-out notices would apply to solicited faxes, constituted good cause to issue retroactive waivers to the petitioners of the opt-out requirements for solicited faxes. FCC 14-164, ¶¶ 22-28. The Commission stated further that "[o]ther, similarly situated parties, may also seek waivers such as those granted in this Order." FCC 14-164, ¶¶ 2, 30.

Amicus is a "similarly situated party" and for good cause shown, Amicus respectfully requests that, pursuant to 47 C.F.R. § 1.3, the Commission grant retroactive waivers of Section

¹ The Complaint filed by Roger H. Kaye is attached hereto as Exhibit 1.

64.1200(a)(4)(iv) with respect to the faxes that have been transmitted by Petitioner with the prior express permission of the recipients.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the matter of:)	CG Docket No. 02-278
)	
Petition of Amicus Mediation & Arbitration Group, Inc., and Hillary Earle for Waiver Regarding 47 C.F.R. § 64.1200(a)(4)(iv) Pursuant to FCC Order 14-164)	CG Docket No. 05-338
)	
)	
)	

PETITION FOR WAIVER REGARDING 47 C.F.R. § 64.1200(a)(4)(iv)

Pursuant to 47 C.F.R. § 1.3, Petitioners Amicus Mediation & Arbitration Group, Inc., and Hillary Earle (collectively “Amicus” or “Petitioners”) respectfully request that the Commission grant Amicus a retroactive waiver of 47 C.F.R. § 64.1200(a)(4)(iv) with respect to faxes that have been transmitted by or on behalf of Amicus, as described in the Commission’s recent Order at FCC 14-164, ¶¶ 2, 30.

I. INTRODUCTION AND BACKGROUND

A. Kaye v. Amicus Mediation & Arbitration Group, Inc.

Hillary Earle established and incorporated Amicus Mediation & Arbitration Group, Inc. in 2008 as a family business. Besides Ms. Earle, the only other corporate officer is her husband, and, at all times relevant to the Kaye complaint, Amicus had no employees other than Ms. Earle. Amicus never owned a fax machine, and, as a small business trying to contain costs, Amicus elected to do its faxing through an electronic, online fax provider, Rapid Fax, where Amicus manually sent documents via fax to its customers. Rapid Fax allows users to send faxes through email or the Rapid Fax website without the need for the sender to use its own fax machine. All of Amicus’ fax numbers are maintained in Amicus’ Rapid Fax directory, and, when utilizing Rapid

Fax, Amicus would manually initiate each fax by selecting the name of the recipient from its directory. Besides sending faxes relating to its mediation and arbitration services, Amicus used Rapid Fax to fax information regarding free Continuing Legal Education ("CLE") training for attorneys, to notify clients of mediator training, and was primarily used for general business purposes, such as sending mediation scheduling notices and arbitration contracts and invoices to clients. Thus, the majority of Amicus' fax usage was to communicate with and send relevant business documents to current clients who expressly requested receipt of the faxes.

As business progressed and Amicus continued to schedule mediations, Amicus would send faxes to plaintiffs' attorneys containing information regarding upcoming mediation days. Many of these attorneys had specifically requested this information and provided their fax number to Amicus. Some specified that they wished to receive faxes, with others simply asking for a list of the mediation days or to be "kept in the loop." Amicus did not believe that it was legally required to include an opt-out notice in faxes sent to recipients who gave prior express permission.

In 2013, Roger H. Kaye and Roger H. Kaye, MD PC filed a putative class action lawsuit against Amicus and Earle, alleging violations of the Telephone Consumer Protection Act.² Included in and chief among Kaye's allegations is the allegation that the opt-out notices included on Amicus' *solicited* faxes failed to comply to the technical specifications in 47 C.F.R. § 64.1200(a)(4)(iv). The District Court has certified three classes of plaintiffs against Amicus pursuant to which plaintiff seeks millions of dollars in damages.

² Notably, Kaye is a plaintiff in at least six other TCPA class action lawsuits in Connecticut federal court alone. See, *Kaye v. EBIO-Metronics, LLC*, 3:13-cv-00349 (D. Conn.); *Kaye v. Merck & Co., Inc.*, No. 3:10-cv-1546 (D. Conn.); *Kaye v. iHire LLC*, No. 3:10-cv-219 (D. Conn.); *Kaye v. SDI Health LLC*, No. 3:10-cv-1 (D. Conn.); *Kaye v. WebMD LLC*, No. 3:09-cv-1948 (D. Conn.); *Kaye v. Aesthera Corp.*, No. 3:09-cv-1947 (D. Conn.).

B. The Recent FCC Ruling (FCC 14-164)

The FCC recently addressed the issue regarding the requirement that solicited faxes comply with the opt-out notice provisions of 47 C.F.R. § 64.1200(a)(4)(iv) in its Order released October 30, 2014. *See* FCC 14-164. This Order addressed approximately twenty-four petitions of parties in similar situations to that of Amicus because the parties believed that the opt-out notice requirements did not apply to solicited faxes, that is, faxes sent to recipients who had provided prior express consent. *See* FCC 14-164, generally.

In its order the Commission found that the opt-out notice requirements do in fact apply to solicited faxes. However, the Commission also found that there was understandable, reasonable confusion as to the applicability of this requirement to solicited faxes resulting from an inconsistent footnote in a subsequent Order regarding the opt-out notice requirements, as well as notice issues. *See* FCC 14-164, ¶¶ 1, 22-30. In addition, the Commission found that it was in the public interest to grant the Petitioners a retroactive waiver of the applicability of the requirements of 47 C.F.R. § 64.1200(a)(4)(iv) to solicited faxes. *See id.* Lastly, the Commission invited similarly situated parties to request retroactive waivers of 47 C.F.R. § 64.1200(a)(4)(iv), prior to April 2015. In so ruling, the Commission clarified the meaning of 47 C.F.R. § 64.1200(a)(4)(iv) while preventing the inequitable result of exposing companies such as Amicus to lawsuits seeking millions of dollars in damages for inadvertent violations of this requirement due to understandable and reasonable confusion.

II. ARGUMENT

Amicus respectfully requests a waiver of compliance with regard to 47 C.F.R. § 64.1200(a)(4)(iv) for faxes sent to individuals from whom Amicus had received prior express

consent. Such waiver would be retroactive to the effective date of the Commission's 2006 Report and Order implementing 47 C.F.R. § 64.1200(a)(4)(iv).

The Commission may waive any of its rules for good cause shown. 47 C.F.R. § 1.3; *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990). See also FCC 14-164, ¶ 23. "A waiver may be granted if: (1) special circumstances warrant a deviation from the general rule and (2) the waiver would better serve the public interest than would application of the rule." FCC 14-164, citing *WAIT Radio*, 418 F.2d at 1166.

As noted in the Commission's recent order regarding the opt-out requirement, special circumstances exist to warrant deviation from the general rule in this case, since two specific bases exist that led to confusion among parties as to the applicability of 47 C.F.R. § 64.1200(a)(4)(iv) to faxes sent with the prior express permission of the recipient. FCC 14-164, ¶ 24.

First, although the TCPA itself does not prohibit the sending of solicited faxes, that is, those sent with the recipient's prior express permission, 47 C.F.R. § 64.1200(a)(4)(iv) states that "[a] facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements of (a)(3)(iii) of this section." However, the Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005 ("Junk Fax Order") stated that "the opt-out notice requirement only applies to communications that constitute *unsolicited* faxes." Junk Fax Order, CG Docket Nos. 02-278, 05-338, 21 FCC Rcd 3787, 3810, n. 154 (emphasis added). These contradictory statements have led to confusion as to the applicability of 47 C.F.R. § 64.1200(a)(4)(iv) to solicited faxes. See FCC 14-164, ¶ 24 ("The use of the word 'unsolicited'

in this one instance may have caused some parties to misconstrue the Commission's intent to apply the opt-out notice to fax ads sent with the prior express permission of the recipient.”)

In addition to noting the confusion caused by the Junk Fax Order, the Commission has also acknowledged that the notice provided of the Commission's intent to adopt 47 C.F.R. § 64.1200(a)(4)(iv)—while sufficient to satisfy the Administrative Procedure Act—did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient. FCC 14-164, ¶ 25.

Amicus is currently involved in a class action lawsuit, wherein Plaintiff interprets 47 C.F.R. § 64.1200(a)(4)(iv) to apply to solicited faxes, and Amicus reasonably believed that opt-out notices were not required to be included in faxes sent to recipients who provided prior express permission. Many, if not all, of the faxes allegedly sent by Amicus were to recipients who had provided prior express consent to receive such faxes. As such, the confusion regarding the requirements of 47 C.F.R. § 64.1200(a)(4)(iv) has exposed Amicus to millions of dollars of liability, and ultimately the loss of its business.

Additionally, it is in the public interest that Amicus be granted a retroactive waiver of the requirements set forth in 47 C.F.R. § 64.1200(a)(4)(iv) as applied to faxes sent with the prior express permission of the recipient. Amicus' alleged failure to comply with this rule—caused by Amicus' reasonable confusion regarding the Commission's requirements—would potentially subject Amicus to millions of dollars in damages under the TCPA, an amount which would almost certainly end the small business. Thus, a waiver serves the public interest in this case to ensure that any confusion on the part of Amicus does not result in inadvertent violations of the requirements of 47 C.F.R. § 64.1200(a)(4)(iv). *See* FCC 14-164, ¶ 27.

III. CONCLUSION

For the foregoing reasons, Amicus requests a retroactive waiver excusing Amicus from compliance with 47 C.F.R. § 64.1200(a)(4)(iv) for any faxes sent by Petitioner with the recipient's prior express consent.

Respectfully submitted,



Geraldine A. Cheverko
ECKERT SEAMANS CHERIN & MELLOTT, LLC
10 Bank Street, Suite 700
White Plains, NY 10606
914.949.2909 (telephone)
914.949.5424 (facsimile)
gcheverko@eckertseamans.com

Marshall D. Bilder
Jason S. Feinstein
ECKERT SEAMANS CHERIN & MELLOTT, LLC
50 West State Street, Suite 1400
P.O. Box 1298
Trenton, NJ 08607
609.989.5043 (telephone)
609.392.7956 (facsimile)
mbilder@eckertseamans.com
jfeinstein@eckertseamans.com

*Counsel for Amicus Mediation & Arbitration
Group, Inc., and Hillary Earle*

Dated: November 13, 2014

Received & Inspected

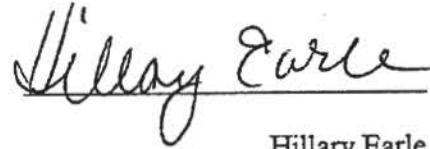
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Declaration of Hillary Earle

I have read the foregoing Petition, and I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief, formed after reasonable inquiry.

Executed on November 11, 2014

A handwritten signature in cursive script that reads "Hillary Earle". The signature is written in dark ink and is positioned above the printed name and title.

Hillary Earle
President
Amicus Mediation & Arbitration Group Inc.

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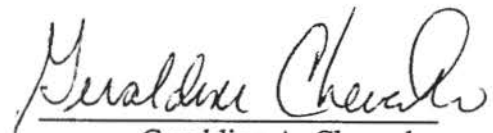
CERTIFICATE OF SERVICE

The undersigned certifies that on November 13, 2014, a copy of Amicus Mediation & Arbitration Group Inc. and Hillary Earle's Petition for Waiver Regarding 47 C.F.R. § 64.1200(a)(4)(iv) was served upon counsel of record at the following address via First Class Mail, postage prepaid:

Aytan Y. Bellin, Esq.
Bellin & Associates, LLC
85 Miles Avenue
White Plains, New York 10606

Roger Furman
Attorney at Law
7845 Henefer Avenue
Los Angeles, CA 90045

The undersigned also hereby certifies that on November 13, 2014, the undersigned caused to be filed, by mail and by electronic service, the foregoing Petition for Waiver Regarding 47 C.F.R. § 64.1200(a)(4)(iv) with the Federal Communications Commission, Office of the Secretary, 445 12th Street, SW, Washington, D.C., 20554.


Geraldine A. Cheverko

NOV 21 2014

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**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

**ROGER H. KAYE and ROGER H. KAYE, MD
PC**, on behalf of themselves and all others similarly
situated,

Plaintiffs,

-vs.-

**AMICUS MEDIATION & ARBITRATION
GROUP, INC. and HILLARY EARLE,**

Defendants.

13 CV _____

Complaint

Class Action

Jury Demanded

MARCH 14, 2013

COMPLAINT

Plaintiffs Roger H. Kaye and Roger H. Kaye, MD PC, on behalf of themselves
and all others similarly situated, allege as follows:

INTRODUCTION

1. Roger H. Kaye and Roger H. Kaye, MD PC (collectively, "Plaintiffs") bring this action against Amicus Mediation and Arbitration Group, Inc. ("Amicus") and Hillary Earle ("Earle") (Amicus and Earle are collectively referred to as "Defendants") for violating the Telephone Consumer Protection Act, 47 U.S.C. § 227 (the "TCPA"), and Conn. Gen. Stat. § 52-570c. Congress enacted the TCPA in 1991 to prevent the faxing of unsolicited advertisements to persons who had not provided express invitation or permission to receive such faxes. In addition, the TCPA and regulations promulgated pursuant to it prohibit the sending of unsolicited as well as solicited fax advertisements that do not contain properly worded opt-out notices. The Connecticut legislature enacted Conn. Gen. Stat. § 52-570c for similar purposes.

2. Upon information and belief, Defendants have jointly and severally caused to be sent out over five thousand (5,000) unsolicited and solicited fax advertisements for goods and/or services without proper opt-out notices to persons throughout the United States, including Connecticut, within applicable limitations periods. As a result, Defendants are liable to Plaintiffs and the proposed Classes of similarly situated persons under the TCPA and Conn. Gen. Stat. § 52-570c.

JURISDICTION AND VENUE

3. This Court has federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 47 U.S.C. § 227. This Court also has supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, over Plaintiffs' and one of the classes' claims under Conn. Gen. Stat. § 52-570c.

4. Venue in this judicial district is proper under 28 U.S.C. § 1391(b)(2), because this is the judicial district in which a substantial part of the events or omissions giving rise to the claims in this case occurred.

THE PARTIES

5. Plaintiff Roger H. Kaye is a citizen and resident of the State of Connecticut.

6. Plaintiff Roger H. Kaye, MD PC is a Connecticut professional corporation, with its principal place of business located at 30 Stevens Street, Norwalk, Connecticut 06850.

7. Upon information and belief, defendant Amicus is a New York Corporation, with its principal place of business located at 557 Windmill Avenue, Suite 25, West Babylon, New York 11704.

8. Upon information and belief, defendant Earle is the Chairman of Amicus and is a resident of New York State.

DEFENDANTS' ILLEGAL JUNK FAXES

9. At all times relevant to this action, Plaintiffs had telephone service at 30 Stevens Street, Norwalk, Connecticut 06850, where Plaintiffs receive facsimile transmissions.

10. On or about October 17, 2010, January 14, 2011, January 22, 2011, January 30, 2011, June 6, 2011 and June 25, 2011, Defendants, jointly and severally, without Plaintiffs' express invitation or permission, arranged for and/or caused a telephone facsimile machine, computer, or other device to send unsolicited at least six fax advertisements (the "Fax Advertisements") advertising the commercial availability or quality of any property, goods, or services, to Plaintiffs' fax machine located at 30 Stevens Street, Norwalk, Connecticut 06850. Copies of those six Fax Advertisements are attached collectively as Exhibit A and incorporated into this Complaint.

11. Plaintiffs did not provide Defendants with express invitation or permission to send any of the Fax Advertisements. The fax advertisements were wholly unsolicited.

12. All of the Fax Advertisements contain a notice (the "Opt-Out Notice") that provides:

NOTE: The information contained in this email message is intended only for use of the individual or entity named above. If the reader of this message is not the intended recipient, or if you have received this communication in error, or wish to not receive any further emails please immediately notify us notify us [sic] by e-mail at hillary.earle@amicusadr.com and destroy the original message. Thank you.

This Opt-Out Notice appears on the first page of some of the Fax Advertisements, and on the second page of the other Fax Advertisements.

13. The Opt-Out Notices in the Fax Advertisements violate the TCPA and regulations thereunder because, among other things, they

(A) fail to state that a recipient may make a request to the sender not to send any future unsolicited advertisements to the recipient's telephone facsimile machine(s);

(B) fail to provide a telephone number to which the recipient may transmit such an opt-out request;

(C) fail to provide a facsimile number to which the recipient may transmit such an opt-out request;

(D) fail to state that a recipient's request to opt out of future fax advertising will be effective only if the request identifies the telephone number(s) of the recipient's telephone facsimile machine(s) to which the request relates;

(E) fail to state that the sender's failure to comply with an opt-out request within 30 days is unlawful;

(F) fail to state that a recipient's opt-out request will be effective so long as that person does not, subsequent to making such request, provide express invitation or permission to the sender, in writing or otherwise, to send such advertisements; and

(G) do not appear on the first page of the Fax Advertisement.

14. Upon information and belief, Defendants either negligently or willfully and/or knowingly arranged for and/or caused the fax advertisements to be sent to Plaintiffs' fax machine.

15. Upon information and belief, Defendants have, from four years prior to the date of the filing of the Complaint in this action through the present, either negligently or willfully and/or knowingly sent and/or arranged to be sent well over five thousand (5,000) *unsolicited and/or solicited* fax advertisements advertising the commercial availability or quality of any property, goods, or services, to fax machines and/or computers belonging to thousands of persons all over the United States. Upon information and belief, those fax advertisements contained a notice identical or substantially similar to the Opt-Out Notice contained in the Fax Advertisements sent to Plaintiffs.

16. Upon information and belief, Defendants have, from four years prior to the date of the filing of the Complaint in this action through the present, either negligently or willfully and/or knowingly sent and/or arranged to be sent well over five thousand (5,000) *unsolicited* fax advertisements advertising the commercial availability or quality of any property, goods, or services, to fax machines and/or computers belonging to thousands of persons throughout the United States. Upon information and belief, those facsimile advertisements contained an opt-out notice identical or substantially similar to the Opt-Out Notice contained in the Fax Advertisements sent to Plaintiffs.

17. Upon information and belief, Defendants have, from two years prior to the filing of the Complaint in this action to the present, either negligently or willfully and/or knowingly sent and/or arranged to be sent thousands of *unsolicited* fax advertisements advertising the commercial availability or quality of any property, goods, or services, to fax machines and/or computers belonging to thousands of persons in Connecticut.

CLASS ALLEGATIONS

18. Plaintiffs bring this class action on behalf of themselves and all others similarly situated under rules 23(a) and 23(b)(1)-(3) of the Federal Rules of Civil Procedure.

19. Plaintiffs seek to represent three classes (the "Classes") of individuals, each defined as follows:

Class A: All persons from four years prior to the date of the filing of the Complaint through the present to whom Defendants sent or caused to be sent a *solicited* or *unsolicited* facsimile advertisement advertising the commercial availability or quality of any property, goods, or services that contained a notice identical or substantially similar to the Opt-Out Notice in the Fax Advertisements sent to Plaintiffs.

Class B: All persons from four years prior to the date of the filing of the Complaint through the present to whom Defendants sent or caused to be sent an *unsolicited* facsimile advertisement advertising the commercial availability or quality of any property, goods, or services that contained a notice identical or substantially similar to the Opt-Out Notice on the Fax Advertisements sent to Plaintiffs.

Class C: All persons in the State of Connecticut to whom, from two years prior to the date of the filing of the Complaint to the present, Defendants sent or caused to be sent a facsimile advertisement without having obtained express invitation or permission to do so.

20. Numerosity: The Classes are so numerous that joinder of all individual members in one action would be impracticable. The disposition of the individual claims of the respective class members through this class action will benefit the parties and this Court. Upon information and belief there are, at a minimum, thousands of class members

of Classes A, B and C. Upon information and belief, the Classes' sizes and the identities of the individual members thereof are ascertainable through Defendants' records, including Defendants' fax and marketing records.

21. Members of the Classes may be notified of the pendency of this action by techniques and forms commonly used in class actions, such as by published notice, e-mail notice, website notice, fax notice, first class mail, or combinations thereof, or by other methods suitable to the Classes and deemed necessary and/or appropriate by the Court.

22. Typicality: Plaintiffs' claims are typical of the claims of the members of Class A because the claims of Plaintiffs and members of Class A are based on the same legal theories and arise from the same unlawful conduct. Among other things, Plaintiffs and members of Class A were sent or caused to be sent by Defendants at least one fax advertisement advertising the commercial availability or quality of any property, goods, or services that contained a notice identical or substantially similar to the Opt-Out Notice in the Fax Advertisements that Defendants sent or caused to be sent to Plaintiffs.

23. Plaintiffs' claims are typical of the claims of the members of Class B because the claims of Plaintiffs and members of Class B are based on the same legal theories and arise from the same unlawful conduct. Among other things, Plaintiffs and members of Class B were sent or caused to be sent by Defendants, without Plaintiffs' or the Class B members' express permission or invitation, at least one fax advertisement advertising the commercial availability or quality of any property, goods, or services that contained a notice identical or substantially similar to the Opt-Out Notice in the Fax Advertisements that Defendants sent or caused to be sent to Plaintiffs,

24. Plaintiffs' claims are typical of the claims of the members of Class C because the claims of the Plaintiffs and members of Class C are based on the same legal theories and arise from the same unlawful conduct. Among other things, Plaintiffs and members of Class C were sent or caused to be sent by Defendants, without Plaintiffs' or the Class C members' express permission or invitation, at least one fax advertisement advertising the commercial availability or quality of any property, goods, or services.

25. Common Questions of Fact and Law: There is a well-defined community of common questions of fact and law affecting the Plaintiffs and members of the Classes. The questions of fact and law common to Plaintiffs and Class A predominate over questions that may affect individual members, and include:

- (a) Whether Defendants' sending and/or causing to be sent to Plaintiffs and the members of Class A, by facsimile, computer or other device, fax advertisements advertising the commercial availability or quality of any property, goods or services that contained a notice identical or substantially similar to the Opt-Out Notice in the Fax Advertisements, violated 47 U.S.C. § 227(b) and the regulations thereunder;
- (b) Whether Defendants' sending and/or causing to be sent such fax advertisements was knowing or willful;
- (c) Whether Plaintiffs and the members of Class A are entitled to statutory damages, triple damages and costs for Defendants' conduct; and
- (d) Whether Plaintiffs and members of Class A are entitled to a permanent injunction enjoining Defendants from continuing to engage in their unlawful conduct.

26. The questions of fact and law common to Plaintiffs and Class B predominate over questions that may affect individual members, and include:

(a) Whether Defendants' sending and/or causing to be sent to Plaintiffs and the members of Class B, without Plaintiffs' or the Class B members' express invitation or permission, by facsimile, computer or other device, fax advertisements advertising the commercial availability or quality of any property, goods, or services that contained a notice identical or substantially similar to the Opt-Out Notice in the Fax Advertisements, violated 47 U.S.C. § 227(b) and the regulations thereunder;

(b) Whether Defendants' sending and/or causing to be sent to Plaintiffs and the members of Class B such unsolicited fax advertisements was knowing or willful;

(c) Whether Plaintiffs and the members of Class B are entitled to statutory damages, triple damages and costs for Defendants' conduct; and

(d) Whether Plaintiffs and members of Class B are entitled to a permanent injunction enjoining Defendants from continuing to engage in their unlawful conduct.

27. The questions of fact and law common to Plaintiffs and Class C predominate over questions that may affect individual members, and include:

(a) Whether Defendants' sending and/or causing to be sent to Plaintiffs and the members of Class C, without Plaintiffs' and class C's express invitation or permission, by facsimile, computer or other device, fax advertisements advertising the commercial availability or quality of any property, goods, or services, violated Conn. Gen. Stat. Ann. § 52-570c(a);

(b) Whether Plaintiffs and the members of Class C are entitled to statutory damages for Defendants' conduct; and

(c) Whether Plaintiffs and members of Class C are entitled to a permanent injunction enjoining Defendants from continuing to engage in their unlawful conduct.

28. Adequacy of Representation: Plaintiffs are adequate representatives of the Classes because their interests do not conflict with the interests of the members of the Classes. Plaintiffs will fairly, adequately and vigorously represent and protect the interests of the members of the Classes and have no interests antagonistic to the members of the Classes. Plaintiffs have retained counsel who are competent and experienced in litigation in the federal courts, class action litigation, and TCPA cases.

29. Superiority: A class action is superior to other available means for the fair and efficient adjudication of the Classes' claims. While the aggregate damages that may be awarded to the members of the Classes are likely to be substantial, the damages suffered by individual members of the Classes are relatively small. The expense and burden of individual litigation makes it economically infeasible and procedurally impracticable for each member of the Classes to individually seek redress for the wrongs done to them. The likelihood of the individual Class members' prosecuting separate claims is remote. Plaintiffs are unaware of any other litigation concerning this controversy already commenced against Defendants by any member of the Classes.

30. Individualized litigation also would present the potential for varying, inconsistent or contradictory judgments, and would increase the delay and expense to all parties and the court system resulting from multiple trials of the same factual issues. The conduct of this matter as a class action presents fewer management difficulties, conserves

the resources of the parties and the court system, and would protect the rights of each member of the Classes. Plaintiffs know of no difficulty to be encountered in the management of this action that would preclude its maintenance as a class action.

31. Injunctive Relief: Defendants have acted on grounds generally applicable to the members of the Classes, thereby making appropriate final injunctive relief with respect to the Classes as a whole.

FIRST CLAIM FOR VIOLATION OF THE TCPA

32. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-31.

33. By the conduct described above, Defendants committed more than five thousand (5,000) violations of 47 U.S.C. § 227(b) against Plaintiffs and the members of Class A, to wit: the fax advertisements Defendants sent and/or caused to be sent to Plaintiffs and the members of Class A were either (a) unsolicited and did not contain a notice meeting the requirements of the TCPA and regulations thereunder, or (b) solicited and did not contain a notice meeting the requirements of the TCPA and regulations thereunder.

34. Plaintiffs and the members of Class A are entitled to statutory damages under 47 U.S.C. § 227(b) in an amount greater than two million, five hundred thousand dollars (\$2,500,000).

35. If it is found that Defendants willfully and/or knowingly sent and/or caused to be sent fax advertisements that did not contain a notice meeting the requirements of the TCPA and regulations thereunder to Plaintiffs and the members of Class A, Plaintiffs request that the Court increase the damage award against Defendants